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Supreme Court, U.S.
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No. 09_____

IN THE

SUPREME COURT OF THE UNITED STATES

HURGENES PIGNARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Hurgenes Pignard, Pro-Se
84628-054
Federal Bureau of Prisons
Federal Correctional Institution
P.O. Box 700
Minersville, PA 17954-0700

QUESTIONS PRESENTED

1. Whether the Court's and Prosecutor's comments about petitioner's failure to testify at trial, made during summation, deprived petitioner of his right to due process and right not to testify under the Fifth Amendment to the United States Constitution, and his right to counsel under the Sixth Amendment to the United States Constitution ?

2. Whether petitioner's conviction is supported by legally sufficient evidence when two mutually exclusive alternative theories of guilt were submitted to the jury, and one of such theories was legally insufficient, due to a lack of corroboration ?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Hurgenes Pignard, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, rendered in this case on December 19, 2008.

OPINIONS BELOW

The opinion (summary order) of the United States Court of Appeals for the Second Circuit is annexed as Appendix A at 1a-7a, and is unpublished.

The order of the United States Court of Appeals for the Second Circuit denying rehearing and rehearing *en banc* is annexed as Appendix B at 8a, and is unpublished

JURISDICTION

The United States Court of Appeals for the Second Circuit affirmed petitioner's conviction in a summary order dated December 19, 2008 (1a-7a).

On April 27, 2009 the United States Court of Appeals for the Second Circuit denied petitioner's application for panel rehearing and for rehearing *en banc* (8a).

No request for an extension has been made, and the petition is submitted late, by a petitioner

who is incarcerated as the result of a federal criminal conviction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]o person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... ."

The Sixth Amendment to the United States Constitution provides in pertinent part: "[I]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

I. Proceedings Below

Following a jury trial in the Southern District of New York (McMahon, J.), petitioner was convicted of conspiracy to rob federally insured banks and credit unions, and attempted robbery of a federally insured bank in Loch Sheldrake, N.Y. in violation of 18 U.S.C. §§ 371 and 2113 [a].

Petitioner was acquitted of possessing a gun during the Loch Sheldrake attempted robbery, and the jury deadlocked on a charge of attempted armed

robbery of the Charter One Bank in Spring Valley, New York.

On October 4, 2007, petitioner was sentenced to 175 months' imprisonment, 3 years of supervised release, restitution in the amount of $272,758.00, and a special assessment of $300.00.

The United States Court of Appeals for the Second Circuit affirmed the conviction in a summary order entered on December 19, 2008 (summary order, 1a-7a).

Petitioner timely filed an application for panel rehearing and for rehearing *en banc*, and by order entered April 27, 2009 the United States Court of Appeals denied both applications (order, 8a).

II. Statement of Facts

The Cooperators

Petitioner's ordeal began on June 16, 2005, with the arrest of Richard Regis and Byron Lindsey in the course of a bank robbery in Long Island, N.Y.

Regis was the leader of a loose knit gang of robbers engaged in numerous armed robberies and attempted robberies of federally insured banks and other cash businesses between December 2004 and June 2005, and Lindsey participated in all of his crimes.

Without cooperating, Regis entered a guilty plea and received a substantial sentence, but Lindsey began cooperating and provided the names of others

he claimed were involved in the crimes, and petitioner was one of several people implicated.

Although naming petitioner and several others (none of whom have ever been charged) in numerous proffers over the next year, Lindsey deliberately failed to name his real accomplices, Eldon Daly and Jamel Bussey who were eventually identified independently by DNA recovered at the location of one of the crimes. During the eleven-month period that Lindsey withheld the identities of Daly and Bussey, he was in telephone contact with Daly from jail, and Daly testified at trial that he knew he would eventually be arrested.

Bussey was located first, and when asked about petitioner's involvement, he did not recognize his name, nor could he identify his photograph, although he did identify Daly, Regis and Lindsey. After obtaining counsel and entering a cooperation agreement, he testified at trial that he participated along with petitioner, Regis, Lindsey and Daly in a robbery attempt in the Loch Sheldrake New York.

Daly was arrested soon after Bussey, and after lawyering up, he too cooperated, naming petitioner as an accomplice in numerous crimes.

Daly and Bussey (who were both facing life in jail) eventually received sentences of time served for their purported cooperation. For his testimony, Lindsey received a sentence of seven years imprisonment, although he admitted lying continuously to the Government about the identities of Daly and Bussey (and many other matters), even after he had agreed to cooperate and had entered a

guilty plea. Concerning these lies, he admitted at trial that he wasn't being truthful with the Government, because he wanted to protect Daly and Bussey.

The Trial

To prove at trial that petitioner personally participated in the underlying crimes, the Government called 15 witnesses, but aside from the testimony of Lindsey, Daly and Bussey, no evidence in the form of records, photographs, videos, fingerprints, DNA, eyewitnesses or ear witnesses was introduced to connect petitioner with any of the charged robberies, or any of the other uncharged crimes.

Aside from trying to prove through the cooperators that petitioner was present during several robberies and attempts, the Government presented an alternate theory that petitioner merely aided the robbers by loaning them his car. Orangetown Detective Stephen Toth testified to a purported admission by petitioner that he had knowingly loaned his car to Regis for use in the Loch Sheldrake robbery attempt.

Toth testified that based on information supplied by Lindsey (before Daly and Bussey had been found out), he questioned petitioner in the Orangetown police station on November 17, 2005, hoping he would cooperate, and help the authorities with the investigation. During the interview petitioner acknowledged that while he knew Regis, and regularly lifted weights with him, he was not involved in any of his crimes. Toth testified that he

told petitioner that he knew of his role in the Loch Sheldrake attempted robbery, and although petitioner denied involvement, he admitted lending Regis his van for use in the robbery. After this interview, petitioner was released, and was not arrested until nine months later (after Daly and Bussey cooperated).

During cross-examination Toth admitted that he made no notes of the interview, because this would disrupt the flow. Although the room was wired, the admission was not recorded, and Toth explained "we don't tape interviews" and "I don't know why we don't tape it, but we don't." He also admitted that the room was equipped to videotape interrogations, but he said in his experience, few suspects agree to be videotaped. When asked whether he needed a suspect's permission to videotape a confession he replied "I honestly don't know." Before releasing petitioner, Toth did not have him sign any document stating the substance of his alleged admission.

Curiously, Toth testified that when petitioner was finally arrested nine months later in August 2006, his arrest was not based on the admission made in the interview.

During trial, the cooperators were effectively cross-examined, revealing numerous admitted lies and inconsistencies.

Lindsey was extensively impeached, and he acknowledged lying throughout his numerous proffers, even after making his plea agreement and entering a guilty plea. When confronted with his

prior inconsistent statements, he explained the contradictions by claiming that his mind no longer functioned properly, because of the time he spent in jail.

For his part, Bussey explained his initial failure to name petitioner, or identify his photograph, by explaining that unless he knows a person's family and shakes a person's hand, he does not consider that person to be known to him.

Daly described petitioner's participation in the attempted robbery of the Charter One Bank in Spring Valley, N.Y., explaining that he, petitioner, Regis and Lindsey all waited in a parking lot across the street from the bank preparing for the robbery as the employees arrived for work in the morning. Daly testified as follows:

> Q. Okay, so the four of you sat for several hours in a rented red car in a parking lot across the street from the bank ?
>
> A. Yeah.
>
> Q. What were you doing during that time ?
>
> A. Just sitting, waiting. Observing the bank. As a matter of fact, we was there early, because we were there before they opened up.
>
> Q. You were there before the bank opened ?

A. If I can remember, yeah. We saw when they came in. And we stayed there all day. So when the manager left in that blue car.

Q. So you stayed there from the time the bank opened until the time the bank closed ?

A. If I'm not mistaken, yeah.

Q. And it was you, Pop, Regis and. Lindsey ?

A. Yeah
Q. And you're sure about that ?

A. Yeah.

Daly's description of this robbery attempt is belied by petitioner's gym records, which show that petitioner was working out in the gym at the time that Daly claims they were all sitting in a car across the street from the bank preparing for the robbery.

Gym owner, Brian Keith, testified that petitioner and Regis both worked out in his gym, often coming in together, and working out for an hour to an hour and a half. Through Mr. Keith, the computer generated gym records were introduced for both men, and he vouched for their accuracy, explaining that the records were created when members swipe their cards at the entrance, and their identities are photographically verified by the receptionist.

While the records confirm that petitioner and Regis were sometimes at the gym together, they also

show conclusively that on the morning of the attempted robbery of the Charter One Bank in Spring Valley (2/3/05), petitioner arrived at the gym at 9:04 a.m. for his workout, directly contradicting the trial testimony of cooperator, Daly.

At the conclusion of the prosecution's case, the defense rested, deciding not to present the testimony of petitioner (who had a prior conviction for felony drug possession, and who was in possession of cocaine when arrested for these crimes), and choosing instead to rely on the weakness of the cooperators' testimony, and petitioner's iron-clad alibi to the Spring Valley bank robbery.

Summations

In his summation, the Prosecutor initially argued that the testimony of the cooperators proved that petitioner was a direct participant in four of the robberies, but he also argued in the alternative that petitioner's admission to loaning his van to the robbers for the Loch Sheldrake attempted robbery was all that was needed to convict him of conspiracy, and attempted robbery (the two charges on which he was ultimately convicted).

Based on the weakness of the evidence, defense counsel argued on summation that the Government was persecuting an innocent man, because he had denied involvement, refused the opportunity to cooperate, and demanded a jury trial. Upon objection to that argument by the Prosecutor, the Court admonished defense counsel in front of the jury, and gratuitously remarked on the defendant's failure to testify stating,

> The defendant hasn't testified, ladies and gentlemen. Can't draw any conclusions about what the defendant would have said if he testified. The defendant has pleaded not guilty, that's what he has done. He has put the government to its burden of proof. Mr. Gerard, your argument is improper.

Emboldened by the Court's comments, the Prosecutor responded on rebuttal to the defense argument that petitioner was innocent by flatly stating "He did not testify."

The Verdict

After deliberating, the jury convicted petitioner of one count of conspiracy to rob federally insured banks and credit unions, and one count of attempted robbery of the federally insured bank in Loch Sheldrake, New York. He was acquitted of possessing a gun during the Loch Sheldrake attempted robbery, while the jury deadlocked on the charge of attempted armed robbery of the Charter One Bank in Spring Valley, New York.

REASONS FOR GRANTING THE PETITION

I. Comments by the Court and Prosecutor concerning petitioner's failure to testify warrant the attention of this Court.

In affirming petitioner's conviction, the Court of Appeals for the Second Circuit rejected petitioner's argument that the comments of the Court and Prosecutor concerning his failure to testify deprived him of a fair trial under the circumstances. In its summary order (at 5a-6a) the Court concludes that these comments do not amount to an improper plea to the jury to infer guilt from such failure, stating,

> Rather, in response to opposing counsel's contention in summation that defendant refused to cooperate with the Government because he was actually innocent, the Government observed that defendant had not offered any evidence, including his own testimony, to support his counsel's statement.

This analysis is remarkable for, confirming what occurred, while ignoring the clear implications of the comments. Obviously, the Government was asking the jury to infer guilt, based on the petitioner's failure to testify, since they made the argument in direct response to his attorney's claims of innocence. Any other conclusion is illogical.

Of what value is a presumption of innocence and a right not to testify, if claiming innocence based on the record opens the door to such an argument by the Government ?

By affirming petitioner's conviction on this basis, the Court of Appeals has decided an important federal question in a way that conflicts with relevant

decisions of this Court, and other appellate courts, and has sanctioned such a departure from the accepted and usual course of judicial proceedings by the lower court, as to call for an exercise of this Court's supervisory power.

The prejudicial effect of such comments is clear, considering that there was no objective evidence to connect petitioner to any of these crimes.

By such comments, the Prosecutor deprived petitioner of a fair trial by interjecting prejudicial remarks concerning his failure to testify, to which he could not respond. *Griffin v California*, 380 U.S. 609 (1965); *Agard v Leonard*, 117 F.3d 696 (2nd Cir. 1997).

Allowing a Court and Prosecutor to comment on the petitioner's failure to testify in these circumstances presents a question of exceptional importance, implicating fundamental rights provided by the Fifth, and Sixth Amendments to the United States Constitution.

Based on the evidence in the record, defense counsel argued that the Government was persecuting an innocent man because he had denied involvement, refused to cooperate, and demanded a jury trial. In response, the Court admonished defense counsel in front of the jury, and gratuitously remarked on the defendant's failure to testify, prompting the Prosecutor to argue the defendant's silence in his rebuttal. Allowing such conduct by the Court and Prosecutor effectively deprives every non-testifying defendant of the right to have an attorney argue his

innocence, presenting an issue of exceptional importance.

The record shows that defense counsel's remarks were fair comment, and the Prosecutor's argument to the contrary was incorrect and improper. During oral argument to the Second Circuit Court of Appeals, the Prosecutor was directed by the Court to read portions of the testimony of Detective Toth, and was forced to admit that his remarks to the jury about the lack of supporting evidence for defense counsel's comments were incorrect, and he was wrong to suggest otherwise to the jury. Remarkably, after eliciting this admission from the Government, the Court overlooked it in deciding that the Government's remarks were permissible.

II. The result below is contrary to this Court's requirement that a guilty verdict cannot stand if alternative theories of culpability are submitted to the jury, one of which is insufficient as a matter of law.

In reaching the decision to affirm, the Court of Appeals for the Second Circuit has decided an important federal question in a way that conflicts with decisions of this Court, and with the decisions of every other Circuit Court of Appeals that has addressed the issue of the sufficiency of trial evidence in these circumstances. It is therefore submitted that this Court's intervention is necessary to secure and maintain uniformity of the Court's decisions.

With the credibility of their cooperating witnesses at issue, the government presented an alternative, inconsistent theory, that petitioner had merely loaned his car to the robbers on the day of the attempted robbery in Loch Sheldrake, knowing that it would be used to commit the robbery. This theory was presented by Det, Toth, who testified that during a stationhouse interview, petitioner admitted loaning his car to the robbers with knowledge of its intended use.

This theory was argued by the Prosecutor in the alternative, and he advised the jury that petitioner's admission to lending the van for the purpose of a robbery provided the single overt act required for a conviction under counts one and three (the counts of ultimate conviction). Throughout his summation, the Prosecutor repeatedly invoked the alleged admission as alternative basis for conviction.

While it is difficult, if not impossible, to determine the basis of the jury verdict in such circumstances, other methods have been devised to determine the validity of such verdicts, without the need to determine which theory the jury relied on. This Court has decided that where two alternative theories of guilt are submitted, and a general verdict results, that verdict cannot stand if one of the theories is legally inadequate. *Griffin v U.S.*, 502 U.S. 46 (1991); *Yates v U.S.*, 354 U.S. 298 (1957).

Here, as a matter of law, the defendant could not be convicted on his admissions alone, absent substantial independent corroborating evidence (which was lacking), to establish the trustworthiness

of the admissions. *Opper v U.S.*, 348 U.S. 84 (1954). The jury's ignorance of this rule renders their verdict defective under *Griffin v U.S.*, supra.

Although petitioner's counsel explained on appeal that his argument does not depend on a determination of which of the two theories was relied on by the jury, the Court of Appeals erroneously concluded that petitioner's argument was "fatally flawed" because it relied on the un-provable premise that his conviction was based solely on the uncorroborated admissions (3a).

Griffin v U.S., supra, involved a single count indictment charging the commission of an offense by two or more means, and this Court declared that a general verdict is valid as long as it is supported by at least one of the submitted grounds. If however, one of those grounds is legally inadequate, as opposed to factually inadequate, the conviction cannot stand. This distinction is justified by the fact that jurors are well equipped to analyze evidence and to choose between factually adequate and inadequate theories, but they "are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law ... ." *Griffin v U.S.*, supra.

Griffin v U.S., supra, has been cited by this Court for the proposition that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by sufficient evidence. *Sochor v. Florida*, 504 U.S. 527 (1992).

The Second Circuit Court of Appeals has also

consistently applied the rule, explaining that,

> ... appeals based on evidentiary deficiencies must be treated differently than those based on legal deficiencies. If the challenge is evidentiary, as long as there was sufficient evidence to support one of the theories presented, then the verdict should be affirmed. However, if the challenge is legal and any of the theories was legally insufficient, then the verdict must be reversed.
>
> *United States v. Garcia*, 992 F.2d 409 (2d Cir. N.Y. 1993).

The law is therefore clear that when two inconsistent theories are submitted to a jury, one of which requires, but lacks adequate corroboration, the defense is not required to prove which theory was relied upon for conviction, and the verdict must be overturned. *Griffin v U.S.*, supra.

Although failing to request an instruction concerning the need for corroboration of admissions, the defense moved to dismiss at the end of the prosecution's case for insufficiency of the evidence, and moved unsuccessfully several days after verdict to vacate the conviction on that ground.

CONCLUSION

This case presents issues beyond mere technicalities, involving the conviction of a man claiming innocence in circumstances where no objective evidence was introduced to connect him with the underlying crimes, other than the improbable, uncorroborated testimony of interested witnesses. It is submitted that the errors complained of could well have tipped the balance in favor of conviction, and for these reasons, the writ should be granted.

Respectfully submitted,

Hurgenes Pignard, Pro-Se
84628-054
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P.O. Box 700
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APPENDIX A

07-4890-cr
USA v. Pignard

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of December, two thousand and eight.

PRESENT:
JOSÉ A. CABRANES,
PETER W. HALL,
Circuit Judges
JOHN GLEESON ,*
District Judge.

UNTIED STATES OF AMERICA,

Appellee,

v. No. 07-4890-cr

HURGENES PIGNARD,

Defendant-Appellant.

FOR APPELLANT: WILLIAM A. GERARD,
Palisades, NY.

APPENDIX A

FOR APPELLEE: JOHN P. COLLINS, JR., (Michael J. Garcia, United States Attorney, Guy Petrillo, Assistant United States Attorney, *on the brief*), United States Attorney's Office for the Southern District of New York, New York, NY.

The Honorable John Gleeson of the United States District Court for the Eastern District of New York sitting by designation.

ISSUED AS MANDATE 5/8/09

Appeal from a judgment of the United States District Court for the Southern District of New York (Colleen McMahon, Judge).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED.**

Defendant-appellant, Hurgenes Pignard, appeals from an October 11, 2007 judgment of conviction of the District Court, sentencing defendant principally to a term of 175 months' imprisonment.

After a nine day trial, a jury found defendant guilty of conspiracy to commit bank robbery and armed bank robbery as well as attempted bank robbery in violation of 18U.S.C. §§ 371 and 2113(a). On appeal, defendant argues that (1) the evidence

presented at trial was insufficient to support his convictions, (2) several of opposing counsel's comments during the trial amounted to prosecutorial misconduct, and (3) his sentence was substantively unreasonable. We assume the parties' familiarity with the facts and procedural history of the case.

(1)

In seeking to overturn a conviction on the grounds that evidence was insufficient, a defendant bears the "heavy burden," *United States v. Cruz*, 363 F.3d 187, 197 (2d Cir. 2004), of demonstrating that, "view[ing] the evidence presented in the light most favorable to the government, . . . no rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt," *United States v. Desinor*, 525 F.3d 193, 203 (2d Cir. 2008) (internal quotation marks omitted). In this case, defendant advances two theories of insufficiency, each of which relies on the fatally flawed premise that the jury disregarded the testimony of defendant's accomplices and instead convicted him solely based on defendant's uncorroborated admissions to law enforcement. In order to accept defendant's premise, we would have to find that the Government's witnesses were simply not credible. However, we may not speculate as to the jury's determinations on that score. See United *States v. Riggi*, 541 F.3d 94, 108 (2d Cir. 2008) ("All issues of credibility, including the credibility of a cooperating witness, must be resolved in favor of the jury's verdict.").

(2)

Defendant's prosecutorial misconduct claim stems from his contention that, during closing argument and rebuttal, the Government (1) improperly bolstered the credibility of witnesses by vouching for them, (2) erroneously instructed the jury that defendant's prior statement to police was, by itself, sufficient evidence to establish his involvement in the charged conspiracy, and (3) asked the jury to draw an inference of guilt from defendant's decision not to testify at trial. Where, as here, a defendant contends that a prosecutor's statements during closing argument warrant reversal, he must meet the "heavy burden" of demonstrating that "the misconduct alleged [was] so severe and significant as to result in the denial of [his] right to a fair trial." *United States v. Feliciano*, 223 F.3d 102, 123 (2d Cir. 2000) (internal quotation marks omitted).

Because defendant objected only to the Government's allegedly improper comments regarding the credibility of its witnesses, we may review his other proffered allegations for misconduct only for plain error--that is, defendant must demonstrate "(1) error, (2) that is plain, and (3) that affects substantial rights." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (internal quotation marks and brackets omitted); see also FED . R. CRIM . P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). If defendant can make these required showings, we may correct an error that

"seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Johnson, 520 U.S. at 467 (internal quotation marks omitted) (alteration in original)

We have previously explained that "the Government has broad latitude in the inferences it may reasonably suggest to the jury during summation." *United States v. Cohen*, 427 F.3d 164, 170 (2d Cir. 2005) (internal quotation marks omitted). Particularly in light of this permissive standard, the statements to which defendant now objects were by no means improper. With respect to vouching, defendant has pointed to no instance, and we have found none, in which a prosecutor "interjected his beliefs" or "made an issue of his own credibility." See *United States v. Rivera*, 971 F.2d 876, 884 (2d Cir. 1992) (rejecting a defendant's claim of improper vouching). Rather, it appears that the Government simply engaged in permissible "vigorous advocacy" by challenging defendant's theory of the case. Id.

Second, the Government's allegedly improper instruction to the jury in fact amounted to a correct statement of the law insofar as it suggested that defendant's statement to the police could be accepted as an admission to aiding and abetting a robbery and a conspiracy. See *United States v. Howell*, 447 F.2d 1114 (2d Cir. 1971). Finally, the Government did not ask the jury to infer guilt from defendant's failure to testify. Rather, in response to opposing counsel's contention in summation that defendant refused to cooperate with the Government because he was actually innocent, the Government observed that

defendant had not offered any evidence, including his own testimony, to support his counsel's statement. We therefore decline to find trial misconduct on the part of the Government's counsel.

(3)

The District Court did not err in sentencing defendant. Reviewing defendant's sentence, as we must, "under a deferential abuse-of-discretion standard," *United States v. Cavera*, - F.3d - , 2008 WL 5102341, at *6 (2d Cir. Dec. 4, 2008) (en banc) (internal quotation marks omitted), we find neither procedural nor substantive deficiencies, see id. ("[A]ppellate scrutiny [of sentences] encompasses two components: procedural review and substantive review."). Defendant points to no procedural error on the part of the District Court. Indeed, the Court, after properly calculating defendant's Guidelines range, granted a five-level downward departure. After applying each of the factors listed in 18U.S.C. § 3553(a), the Court offered a careful explanation of the sentence it imposed. In our view, the sentence imposed was clearly "within the range of permissible decisions" available to the District Court in this case. See id.; see also id., at *10 ("[O]nce we are sure that the sentence resulted from [a district court's] reasoned exercise of discretion, we must defer heavily to the expertise of district judges.").

Conclusion

For the reasons stated above, the judgment of the District Court is AFFIRMED.

APPENDIX A

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk
of Court

By: /S/ Frank Perez

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of April, two thousand and nine,

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United States of America,
Appellee,

v.

Hurgenes Pignard,
Defendant-Appellant.

ORDER

Docket Number:07-4890-cr

Appellant, Hurgenes Pignard having filed a petition for a panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court
Catherine O'Hagan Wolfe, Clerks

By: /S/ Frank Perez
Frank Perez, Deputy Clerk